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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1113

EDDIE J. VIATOR,

Appellant,

vs.

STATE TAX COMMISSION OF MISSISSIPPI, ET AL.,

Appellees.

MOTION FOR LEAVE TO FILE AMENDED JURISDICTIONAL STATEMENT.

Comes the Appellant, through undersigned Counsel, and respectfully moves the Court for leave to file an Amended Jurisdictional Statement herein, so as to more fully and accurately, and completely, show the substantial Federal questions involved in this appeal, the manner in which such questions are substantial, and a statement of the grounds upon which it is contended the questions involved are substantial, as Required by Rule 12, par. 1.

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Appellant.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1113

EDDIE J. VIATOR,

Appellant,

vs.

STATE TAX COMMISSION OF MISSISSIPPI, ET AL.,

Appellees.

AMENDED JURISDICTIONAL STATEMENT.

MAY IT PLEASE THE COURT:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The Act of February 13, 1925, Chapter 229, Section 1, 43 Stat. 936, 938, (United States Code, Title 28, Section 345), provides that Section 237 of the Judicial Code is amended to read in part as follows:

"Sec. 237. (a) A final judgment or decree in any suit in the highest court of a State in which a decision in the suit could be had, where is drawn in question the validity of a

treaty or statute of the United States, and the decision is against its validity; or where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error. The writ shall have the same effect as if the judgment or decree had been rendered or passed in a court of the United States. The Supreme Court may reverse, modify, or affirm the judgment or decree of such State court, and may, in its discretion, award execution or remand the cause to the court from which it was removed by the writ."

The statutory provision believed to sustain the jurisdiction of the Supreme Court of the United States, to review the above entitled cause on appeal, is, therefore, Sec. 237 (a) of the Judicial Code, as amended by Act of Feb. 13, 1925, Chapter 229, 43 Stat. 936, 938.

The Statutes of the State of Mississippi, the validity of which is involved, are Chapter 113, Laws of 1938, known as the Sales Tax Law of Mississippi, Sections 6 and 12, and Chapter 150, Laws of 1938, Section 1, which statutes, and the particular sections thereof mentioned here, are to be found at pages 94, 95, — and —, of the General Laws of Mississippi of 1938, where Sections 6 and 12 are set out, and at pages 346, 7, 8, and 349 of the General Laws of Mississippi of 1938, where Section 1, amending Section 2 of Chapter 119, Laws of 1932, is fully set out, the particular provisions of Section 1, Chapter 150, Laws of 1938, the validity of which is involved, are to be found at pages 348 and 349, General Laws of Mississippi of 1938, said Sections being in the following language, viz:

"Sec. 6. Be it enacted, that section 8 of chapter 119, laws of 1934, as amended by chapter 158, laws of 1936, be and the same is hereby amended so as to read as follows:

Taxpayer must keep records—failure to make returns—duty and power of commissioner.

"It shall be the duty of every person engaging or continuing, in this state, in any business for which a privilege tax is imposed by this act to keep and preserve adequate records of the gross income, gross receipts or gross proceeds of sales of such business and such other books or accounts as may be necessary to determine the amount of tax for which he is liable, under the provisions of this act, which said records shall be adequate in substance rather than form, to conform to the requirements and regulations promulgated by the commissioner; and all of such records shall be written in the English language. And it shall be the duty of every such person to keep and preserve, for a period of two years, all invoices of goods and merchandise purchased for resale, and all such books, invoices and other records shall be open for examination at any time, by the commissioner or his duly authorized agent.

"The records provided for in this section shall be kept at the taxpayer's principal place of business within this state, and failure to keep such records shall subject the person so failing to all the penalties of this act.

"If adequate records of the gross income, gross receipts or gross proceeds of sales are not maintained or invoices preserved as provided herein, the commissioner may make additional returns and assessments from the best information available, and shall give notice by registered mail of such returns and assessments, and such returns and assessments shall be prima facie correct for the purpose of this act, and the amount of tax shown due thereby shall be a lien against all the property of the taxpayer until discharged by payment and if such tax be paid within ten days after notice by the commissioner, then there shall be added ten per centum as damages and interest at the rate of one

per centum per month from the time such tax was due until paid. If payment be not made within ten days after demand therefor by the commissioner, there may be added twenty five per cent for the first offense and fifty per cent for subsequent offenses as damages together with interest at the rate of one per centum per month on the tax from the time such tax was due. Provided, however, in the event such taxpayer, with ten days from the date of such notice, shall by petition in writing state that said return is incorrect, the commissioner shall grant a hearing on such petition and investigate that question fully before proceeding further under this section."

Section 12, provides, in substance, that the commissioner or his authorized agents, may examine any books, papers, record, or other data bearing upon the correctness of any return, or for the purpose of making a return where none has been made, as required, including the records of any common carrier, bank, wholesale or retail dealer in any kind of merchandise, doing business in the state of Mississippi, whether in regard to his own or another's return, and authorizes the commissioner to require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons.

Section 1, Chapter 150, Laws of 1938, reads as follows:

"Section 1. Be it enacted by the Legislature of the State of Mississippi, That section 2 of chapter 119, Laws of 1932, be amended to read as follows:

"The governor shall designate the other associate commissioner as 'excise commissioner', who shall be selected from the state at large, and who shall preferably, though not necessarily, be an attorney at law.

"It shall be the duty of the excise commissioner to familiarize himself with the laws imposing income, sales and

other taxes administered by the chairman of the commission. He shall have charge of all appeals from decisions of the chairman to the entire commission, shall arrange the time and place of hearing such appeals, and shall provide for the preparation and presentation to the commission of all evidence, documents, and other matters necessary and proper for a decision on the matters and questions involved in the appeal. The excise commissioner shall, when necessary, direct and supervise the preparation of any record to be filed in any court of the state. When directed by the other members of the commission, and agreed to by the appealing taxpayers, he may hold a hearing on any appeal from a decision of the chairman at the time and place agreed to, and at such hearing shall take the testimony of witnesses, verbally, or in writing, take depositions, and shall have the power to require the production of books and other records and papers which the chairman is authorized to demand or examine, and he shall have authority to make copies of same. At the conclusion of the hearing, the excise commissioner shall submit all written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter. Whereupon the whole commission, if the appealing taxpayer assents thereto, shall render its decision on the appeal; but if the taxpayer desires a further hearing on the cause, the whole commission shall hear the appeal at its office in the capitol. * * *"

B.

Date of the Judgment and Application for Appeal.

The date of the judgment sought to be reviewed is January 12, 1942. A suggestion of error was filed by appellant, and said suggestion of error was overruled by the Supreme

Court of Mississippi, on February 9, 1942. Petition of appellant for allowance of appeal to the Supreme Court of the United States, accompanied by assignment of errors and prayer for reversal, was presented to the Chief Justice of the Supreme Court of Mississippi, in his office in the City of Jackson, Mississippi, on Monday, March 9th, 1942, and the appeal was allowed.

C.

Nature of Case and Rulings Below.

This is a proceeding to collect additional sales tax from appellant for the years 1937 and 1938, pursuant to the authority of Section 6, Chapter 113, Laws of 1938. Following receipt of the registered notice, required to be mailed the taxpayer, by said Section 6, appellant filed his written petition and prayed for the hearing provided by the statute, asking appellees to investigate the matter fully before proceeding further under the section. Appellant raised the question of jurisdiction of appellees to make the additional assessment, without first showing he had failed to preserve invoices for a period of two years, or maintain adequate records. He moved to quash the assessments, else that they be abated until the statutory duties enjoined on appellees were fully discharged. The hearing was granted, but appellees refused to investigate the matter fully, and said they would not investigate it fully or at all. No record was made of the testimony of appellant and the witnesses introduced by him, which testimony showed the additional assessments were not made from the best information available, as required by the act, but by comparison, appellees comparing the business of appellant for the years 1937 and 1938, because of which the additional assessments are made, with the business of other merchants in Gulfport, Mississippi, in the year 1939, and which testimony further showed that appellees made the assessments

against appellant purposely high to take care of whatever they might be able to find. Such testimony was not contradicted and not denied; in fact it was not even disputed. No evidence was introduced by appellees, no books, records or other papers, and no depositions were taken, and nothing whatever was introduced in evidence. At the conclusion of the hearing, before the excise commissioner, as provided by Section 1, Chapter 150, Laws of 1938, such Excise Commissioner failed and refused to submit written evidence, documents, records and other pertinent information to the other members of the Commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter. There was nothing done that remotely resembles a hearing, and certainly the duty enjoined on appellees by the statute to investigate the matter fully, to subpoena witnesses, examine books, records and other data, and at the conclusion of the hearing, to submit all written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause, and the essential facts of the matter, was not performed. It is contended by appellant here that the statutes referred to, as construed and applied by appellees and the Supreme Court of the State of Mississippi, in this cause, deprive appellant of due process of law, and violate the Fourteenth Amendment to the Constitution of the United States.

The matters involved are substantial in that the statutes, as construed and applied by appellees, in which they were upheld by the Supreme Court of Mississippi, deprive appellant of that due process which the legislature intended, and which it was the intention of the Fourteenth Amendment to guard against impairment by state action. Said statutes were so construed and applied, that appellees were permitted to proceed against appellant without subpoenaes

for witnesses, without the documents, evidence and depositions provided by the statutes, without being required to inform appellant of the state of case he was required to meet and defend, without a record of the proceedings, and without a finding of fact, setting forth a review of the cause and the essential facts of the matter, contrary to the express provisions of Sections 6 and 12, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, and thus said statutes, as construed and applied, deprive appellant of due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States. The questions involved are, therefore, substantial. Without compliance with the statutes, as enacted by the legislature, appellees in this cause were permitted to make the additional assessments against appellant. Appellant was deprived of the opportunity to know the state of the case against him, given no opportunity to defend himself, and the action of appellees was, hence, arbitrary and capricious. To permit appellees to collect the amount of the said additional assessments, will take the property of appellant without due process of law.

From the time of filing his petition, following receipt of the registered notice of the additional assessments for sales tax, appellant attacked the constitutionality of Section 6, Chapter 113, Laws of 1938, Section 12, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, of Mississippi, as construed and applied by appellees, in proceeding against him arbitrarily and without due process. The questions involved in this cause are substantial, the Federal question being whether the action of appellees deprive appellant of due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States. The statutes themselves, if properly construed and applied, may be constitutional, except as to the delegation of legislative power, later to be covered in this Amended

Statement of Jurisdiction, providing for Notice by Registered Mail, hearings, introduction of evidence, documents and records and other data, summoning witnesses, making a report in writing setting forth a review of the cause and the essential facts of the matter. Here the procedure was not as provided by the statutes. Appellees so construed the statutes that they were not required to afford appellant an adequate hearing, refused him subpoenas, a record of the cause, refused to investigate the matter fully, or at all, a report in writing setting forth a review of the cause and the essential facts of the matter. They construed the statutes as not requiring them to introduce evidence. Appellant contends he was not afforded a hearing within the meaning of the statutes, that no fair and adequate hearing was held by appellees, and the assessments are void on their face for want of evidence to support them, and a finding of fact by appellees upon which the court can pass judgment, or know what was before the State Tax Commission of Mississippi, and upon what the additional assessments against appellant were, and are, founded, beyond the naked charge that appellant owes additional sales tax to the State Tax Commission of Mississippi.

The Federal question presented by the record of this cause was raised by pleas in abatement, R. 20,[1] Motions to quash, R. 20, Special bill of exceptions, R. 20, Objections Nos. 1 to 10, inclusive, and Objections Nos. 1 to 18, inclusive, R. 20, Motion for Bill of Particulars, R. 20, Interrogatories, R. 20.

Appellant's motion for Bill of Particulars was overruled by appellees, and his interrogatories were refused.

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[1] All references to the record are to the pages of the certified transcript of the unprinted record prepared by the Clerk of the Supreme Court of Mississippi, and on file with the Clerk of this Court. The record has not yet been printed.

The Objections to the Order of May 24, 1940, appear at R. 25 through R. 30.

The Objections to the Order of January 12, 1940, appear at R. 45 through R. 48.

The Special Bill of exceptions requested by appellant, and refused by appellees, appears at R. 31 through R. 36.

Plea in Abatement appears at R. 62.

Amended Plea in abatement appears at R. 57.

Motion to quash assessment appears at R. 70.

Amended motion to quash assessment appears at R. 65.

Interrogatories propounded by appellant appear at R. 84.

Motion for Bill of Particulars appears at R. 86.

The Federal question involved in this cause was further presented by Petition for writ of certiorari, filed in the Circuit Court of Hinds County, Mississippi, R. 4-18. The Federal question was again presented in the Supreme Court of Mississippi, by Assignment of Errors, R. 168-171, and by Suggestion of Error, R. 172-178.

Appellant appends to this statement of jurisdiction copy of the opinion of the Supreme Court of Mississippi, affirming the Circuit Court of Hinds County, Mississippi, rendered January 12, 1942. Appellant also appends to this Statement of Jurisdiction copy of Per Curiam request of the Supreme Court of Mississippi for additional brief on the Federal question involved in this cause.

Appellees ignored the Federal question. The Circuit Court of Hinds County, Mississippi, pretermitted decision of the Federal question, but delivered no written opinion. The Supreme Court of Mississippi, as shown by copy of the opinion of the Court appended to the original Statement of Jurisdiction filed herein, disposed of the question by holding that "The assessment here made by the Chairman of the State Tax Commission sufficiently complies with these requirements, it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Chairman

of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based. The Order of the State Tax Commission being simply one approving the assessment made by its Chairman, it was not necessary for it to again set forth the facts on which the assessment was made."

As shown by the record of this cause, the assessments have no foundation in fact. The Court supposes what does not exist. Nothing was introduced or shown by appellees. No report in writing was made setting forth a review of the cause and the essential facts of the matter, required by Section 1, Chapter 150, Laws of 1938, because such essential facts do not exist.

The Supreme Court of Mississippi disposed of the contention of appellant, that Orders of Quasi-judicial commissions and bodies must be supported by a finding of basic facts; otherwise they are unconstitutional, null and void, and violate the Due Process Clause of the Constitution of the United States, and Sec. 14 of the Constitution of Mississippi, by holding as quoted above.

The other contentions of appellant, that appellees proceeded against him arbitrarily, and denied him due process of law, guaranteed by the Fourteenth Amendment to the Constitution of the United States, were ignored by the Supreme Court of Mississippi, as shown by the opinion of the Court.

Cases sustaining the jurisdiction of the Supreme Court of the United States to review this cause, relied upon by appellant, are the following, in brief:

American Sugar Refining Co. v. *State of Louisiana*, 21 S. Ct. 43, 179 U. S. 89, 45 L. Ed. 102;

Southern P. Co. v. *Schuyler*, 227 U. S. 601, 611, 57 L. Ed. 662, 669, 33 S. Ct. 277;

Norfolk, etc. R. Co. v. *Conley*, 236 U. S. 605, 35 S. Ct. 437, 59 L. Ed. 745;

Kansas City Southern R. Co. v. *H. Albers Commission Co.*, 223 U. S. 573, 591, 593, 56 L. Ed. 556, 565, 566, 32 S. Ct. 316;

Merchants' Nat. Bank v. *Richmond*, 256 U. S. 635, 41 S. Ct. 619, 65 L. Ed. 1135;

Fiske v. *State of Kansas*, 274 U. S. 380, 71 L. Ed. 1108, 47 S. Ct. 655;

Northern Pac. Ry. Co. v. *Department of Public Works of Washington*, 268 U. S. 39, 69 L. Ed. 836, 45 S. Ct. 412;

Southern Ry. Co. v. *Virginia*, 290 U. S. 190;

Londoner v. *Denver*, 210 U. S. 373;

Fallbrook Irrigation District v. *Bradley*, 164 U. S. 112, 171;

Wichita R. & Light Co. v. *Public Utilities Commission of Kansas*, 260 U. S. 48;

Mahler v. *Eby*, 264 U. S. 32;

Greene v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508;

Bi-Metallic Co. v. *Colorado*, 239 U. S. 441;

Ohio Bell Tel. Co. v. *Public Utilities Commission of Ohio*, 301 U. S. 292;

Pacific States Box & Basket Co. v. *White*, 296 U. S. 176;

Chicago, Milwaukee & St. Paul Ry. Co. v. *Minnesota*, 134 U. S. 418, 33 L. Ed. 970, 10 S. Ct. 462;

Ohio Valley Water Co. v. *Ben Avon Borough*, 253 U. S. 287, 64 L. Ed. 908, 40 S. Ct. 527.

It is further the contention of appellant that Section 6, Chapter 113 of the Laws of Mississippi of 1938, is unconstitutional, null and void and violative of the due process clause of the Federal and State Constitutions and the equal protection clause of the Constitution of the United States, in that it permits the Chairman of the State Tax Commission to proceed without benefit of compulsory process for the

production of witnesses, books, records and other matter necessary to the proper determination of additional sales tax, and said Act is unconstitutional and violates the Fourteenth Amendment of the Constitution of the United States as to the rights of appellant in that it permits the additional sales tax assessment attempted to be enforced against appellant without the benefit of written evidence, without requiring his interrogatories to be answered and a bill of particulars to be furnished; and, further Section 6, Chapter 113, Laws of 1938, permitting appellees to make additional returns and assessments from the "best information available" without defining and limiting the power and right of the appellees, vests legislative discretion with appellees, and is an attempt to delegate legislative prerogatives to appellees, and said section, and particularly said provision, is unconstitutional, null and void.

The inferior administrative tribunal ignored and overruled appellant's pleas in abatement and motions to quash, raising all of these questions, which are substantial, and the appellate court ignored the contention of appellant, and, as shown by the opinion of said court, pretermitted a decision on said matters. The questions presented here were brought to the attention of the Supreme Court of Mississippi through petition for writ of certiorari (R. 4-13) and by assignment of errors (R. 168-171) filed in said court and printed briefs on behalf of appellant in Cause No. 34,664 on the docket of said Supreme Court. The decisions of this Court relied upon by appellant to sustain his contention that this Court has jurisdiction to review his attack upon the provision of Section 6 of Chapter 113 of the Laws of 1938 of Mississippi, permitting appellees to make additional sales tax assessments from the "best information available" are the following:

Wilson v. *Eureka City,* 173 U. S. 32;

Green v. *Louisville & Interurban R. R. Co.*, 244 U. S. 499, 508;

Chicago Great Western Ry. Co. v. *Kendall*, 266 U. S. 94, 97-98.

Appellant submits that the question above presented is substantial in that appellees, under the statute, are permitted to make additional assessments against appellant without rule, norm, or formula, and the statute does not define the meaning of "best information available", and what might be the best information available in one case would be materially different in another, and thus several yardsticks for measuring additional sales taxes would be available to appellees. Appellant raised the question in the lower court and again in the Supreme Court of Mississippi, through his petition for writ of certiorari, shown at pages 10 and 11 of the record, and again at R. 13-17.

Appellant submits that the questions presented, showing jurisdiction of this Court to review the judgment of the Supreme Court of Mississippi on appeal are substantial; they present a Federal question. The Supreme Court of Mississippi has not passed upon the contention of appellant, in this or other cases, and the decision of the Supreme Court of Mississippi in the case appealed to the Supreme Court of the United States is contrary to the decisions of the Supreme Court of the United States, and because of the Federal questions involved this Court has jurisdiction to decide and is free to pass upon all controverted issues whether or not they involve Federal questions, and the permissibility of delegation of power may thus be deliberated and, in the absence of controlling State decisions, will be determined as an original proposition. The case relied upon by appellant to sustain the jurisdiction of this Court upon this last proposition is:

Yick Wo v. *Hopkins*, 118 U. S. 356.

We respectfully submit that this Court has jurisdiction of this appeal by virtue of Section 237 (a) of the Judicial Code as amended by the Act of February 13, 1925.

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Appellant.

APPENDIX "A".

IN THE SUPREME COURT OF MISSISSIPPI.

No. 34,664.

In Banc.

EDDIE J. VIATOR

vs.

STATE TAX COMMISSION, et al.

Per CURIAM:

One of the appellant's contentions is that "Orders of Quasi-judicial commissions and bodies must be supported by a finding of basic facts; otherwise they are unconstitutional, null and void, and violate the Due Process Clause of the Constitution of the United States, and Sec. 14 of the Constitution of Mississippi."

The Court desires briefs addressed and confined to the question thus raised. The briefs should discuss the following questions:

1. Is that State Tax Commission a quasi-judicial commission or a mere administrative agency?

2. What "finding of basic facts" should, but does not, appear in the order of the State Tax Commission here in question?

3. What provision of the Constitution, or of a statute, or rule of the common law requires such a finding to appear in the order of the commission?

4. Does the fact that the order here in question is one assessing property differentiate it, in so far as the question here under consideration is concerned, from other orders of an administrative agency?

5. May the recitals in the last notice, the notice being framed by the Commissioner himself, be considered as a part of the order, and as sufficient to supply recitals, which,

according to appellant's apparent contention, ought to have been a part of the order itself?

No other questions should be discussed in these briefs.

The brief of counsel for the appellant to be filed on or before October 10, 1941; the reply thereto by counsel for the appellee to be filed within one week after the filing of the brief for counsel for the appellant; the rejoinder of counsel for the appellant to be filed within five days after the filing of the brief of counsel for the appellee. These dates may be changed by written agreement of counsel filed with the clerk of this Court; copies to be served in accordance with the rules of this Court.

APPENDIX "B".

IN THE SUPREME COURT OF MISSISSIPPI.

No. 34,664.

(Opinion Rendered January 12, 1942)

14840. In Banc.

EDDIE J. VIATOR

vs.

STATE TAX COMMISSION, et al.

SMITH, *C. J.:*

This is an appeal from a judgment affirming an order of the State Tax Commission approving two additional sales tax assessments against the appellant. The assessments were made by the Chairman of the State Tax Commission under the provisions of Sections 5 and 6, Chap. 113, Laws of 1938, and were approved by the State Tax Commission on an appeal to it.

Section 8 of that statute provides that "No injunction shall be awarded by any Court or Judge to restrain the

collection of the taxes imposed by this act or to restrain the enforcement of this act." The appellant says that this provision of the statute violates Section 159 of the State's Constitution which prescribes the jurisdiction of the chancery court. This may or may not be true, but we are not called on to determine it for the reason that if this section of the statute does run counter to the Constitution, that fact would have no effect on the remainder of it, which would remain in full force and effect.

Another of the appellant's complaints is that "there is no presumption in favor of the validity of an order unless there is evidence to support such order." The order referred to is that made by the Tax Commission approving this assessment. Whether this order of the State Tax Commission is supported by evidence was not before the court below and is not before us here, for the reason that under Sections 72 and 73, Code 1930, the court to which a case has been removed by a writ of certiorari is "confined to the examination of questions of law arising or appearing on the face of the record and proceedings." Federal Credit Co. *v.* Zepernick Gro. Co., 153 Miss. 489, 120 So. 173; Hamilton *v.* Long, 181 Miss. 627, 180 So. 615.

Three of the appellant's remaining complaints necessary to be considered are:

1. State Tax Commission has only such jurisdiction as conferred by Statute. In the case of additional assessments for sales tax, such can be made only for failure to keep adequate records and preserve invoices for a period of two years. Unless jurisdictional facts appear of record, the State Tax Commission has no jurisdiction to make an additional assessment for sales tax.

2. The claim that taxpayer kept records and preserved invoices for a period of two years, is a denial of an essential jurisdictional fact, and before the State Tax Commission could proceed under the law, jurisdiction to make the additional assessment must be proven by appellees, and must affirmatively appear of record.

3. Orders of Quasi-judicial commissions and bodies must be supported by a finding of basic facts; otherwise they are

unconstitutional, null and void, and violate the Due Process Clause of the Constitution of the United States, and Sec. 14 of the Constitution of Mississippi.

These three complaints will be considered together.

Under Sections 4, 5, and 6, Chap. 113, Laws of 1938, it is the duty of a person liable to the tax imposed on sales of property to make a return to the chairman of the State Tax Commission, on prescribed forms, of all cash and credit sales made by him. When this is done, the chairman of the Commission, designated in the statute, and will hereinafter so be, as the Commissioner, is charged with the duty of examining into its correctness. In so doing, he may examine the books and other records of the taxpayer, if any (Sec. 6), and (Sec. 12) "any books, papers, record, or other data bearing upon the correctness of any return * * * including the records of any common carrier, bank, wholesale or retail dealer in any kind of merchandise, doing business in this state, * * * and may require the attendance of any person and take his testimony with respect to any such matter, with power to administer oaths to such person or persons." If (Sec. 6) adequate records of his sales are not kept by the taxpayer, the Commissioner may determine the correctness of the taxpayer's return thereof "from the best information available." If the Commissioner finds that the taxpayer's return of the amount of his sales is less than it should be, it becomes his duty to make an additional return or assessment of the amount of the taxpayer's sales. When this is done, he must give the taxpayer written notice thereof by registered mail, and, if the taxpayer makes no objection thereto, the return or assessment becomes final. If, however, the taxpayer so requests, he shall be given a hearing on the assessment by the Commissioner, and, if dissatisfied with the result thereof, he may appeal (Sec. 8) therefrom to the State Tax Commission which, after a full hearing and consideration of the evidence introduced by the taxpayer, must either approve, disapprove, or modify the assessment. This procedure was here followed.

Two additional returns or assessments were here made by the Commissioner on blank forms prescribed for that

purpose, the statute not requiring such to be entered on an assessment roll. One of these returns, after setting forth the taxpayer's name and address, recites: "An examination of your records made in accordance with Sections 7, 8, and 18 of the Sales Tax Law of 1932 as re-enacted and amended, for the period from January 1, to December 31, 1938 indicates an additional tax due thereon in the amount of $1,606.64 arrived at as follows." It then sets forth the amount of sales theretofore reported by the taxpayer and the amount thereof found by the Commissioner, in addition to that returned by the taxpayer, with this notation, "prima facie assessment, same having been made from the best information available." It then sets forth the amount of taxes due on the sales by the taxpayer. The notice by registered mail to the appellant of this additional return is, in part, as follows: "You are hereby given notice, by registered mail, of the hereinafter assessments made against you from the best information available in addition to the previous returns and payment of sales tax heretofore made by you for the periods January 1, 1937, to December 31, 1937 and January 1, 1938 to December 31, 1938, by reason of the fact that the records kept by you were not adequate to determine the amount of tax for which you were heretofore liable, which said amended and additional assessments are as shown by copies of returns and assessments hereto attached for the said respective years." The other assessment was for the year 1939, and it and the notice were similar to the above. The order of the Tax Commission simply approved the assessments and stated the amount of the tax due thereon.

The right and duty of the Commissioner to make an additional return or assessment of the taxpayer's sales in addition to that returned by him, is not dependent on the failure of the taxpayer to keep adequate records, and the only effect of the provision as to inadequate records in Section 6 of the statute is to permit the Commissioner, when the taxpayer's records are inadequate, to determine the correctness of the return made by him "from the best information available."

The Chairman of the State Tax Commission possesses only such powers as are conferred on him by statute expressly or by implication, and he can make an additional sales tax assessment in only such cases as the statute permits. He possesses in this respect a special and limited and not a general jurisdiction. A tribunal or officer exercising a special and limited jurisdiction can act only when the facts exist which invest him with authority to act, and these facts, in their ultimate and essential aspects, here the additional assessment and the grounds for making it, must be disclosed by the order made thereon. The assessment here made by the Chairman of the State Tax Commission sufficiently complies with these requirements, it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Chairman of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based. The order of the State Tax Commission being simply one approving the assessment made by its Chairman, it was not necessary for it to again set forth the facts on which the assessment was made.

Affirmed.

[redacted]

No. 1113

EDDIE J. VIATOR,

vs.

STATE TAX COMMISSION OF MISSISSIPPI, ET AL.,

BRIEF ON PETITION FOR REHEARING

Albert Sidney Johnston, Jr.,

Counsel for Appellant, Petitioner

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1113

EDDIE J. VIATOR,

Appellant

vs.

STATE TAX COMMISSION OF MISSISSIPPI, ET AL., Appellees

BRIEF ON PETITION FOR REHEARING

May It Please the Court:

Believing that it will be helpful to the Court in passing on the matters presented for the consideration of Your Honors, in his Petition for Rehearing, Petitioner submits the following brief memoranda of authorities and argument of the reasons why his Petition for Rehearing, filed herein, should be granted, and the judgment of the Supreme Court of Mississippi, on further consideration, be reversed.

Jurisdiction of Appellees.

The Supreme Court of Mississippi has correctly stated the law, that a tribunal or officer exercising a spe-

cial and limited jurisdiction can act only when the facts exist which invest it, or him, with authority to act. However, appellant challenges the correctness of the Court's opinion with reference to showing of jurisdictional facts. The Court has held that "these facts, in their ultimate and essential aspects, here the additional assessment and the grounds for making it, must be disclosed by the order made thereon. The assessment here made by the Chairman of the State Tax Commission sufficiently complies with these requirements, it became thereby prima facie correct, and the taxpayer was given an opportunity both by the Chairman of the Commission and by the Tax Commission itself to negative by evidence the facts on which the assessment was based. The order of the State Tax Commission being simply one approving the assessment made by its Chairman, it was not necessary for it to again set forth the facts on which the assessment was made."

Appellant submits that the authority of appellees depends on the statutes, Section 6, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938. It is urged upon the Court that the action of appellees in the proceeding against appellant must appear to be, and be, within the scope of the authority thus conferred. It is respectfully submitted that the administrative determination of jurisdiction must be examined, on judicial review; otherwise appellant will be without due process of law. This Honorable Court has held that no commission can be the final arbiter of its own jurisdiction; just as no corporation can conclusively determine whether its act is or is not ultra vires. This Court has further held held that an administrative determination of jurisdiction and the exercise of

powers thereunder must always be permitted to the party affected.

In Noble v. Union River Logging Railroad Company, 147 U. S. 165, 173, the Court held:

> "In every proceeding of a judicial nature, there are one or more facts which are strictly jurisdictional, the existence of which is necessary to the validity of the proceedings, and without which the act of the court is a mere nullity."

Appellant submits that in a case where the determination of fact has failed to show that the administrative body had jurisdiction, the acts of that body are void.

In Little v. Barreme, 2 Cranch (U. S.) 170, the Court held that the officer who had acted under a regulation issued by the President in excess of his authority was not protected under it.

In Francis v. Francis, 203 U. S. 233, the Court held that the President was acting outside his jurisdiction in inserting in a certain land patent words restricting the power of alienation.

In Dynes v. Hoover, 20 How. (U. S.) 65, the Court held that the determination of a naval court martial regarding jurisdiction was reviewable by the court.

In American Magnetic School of Healing v. McAnnulty, 187 U. S. 94, the Court held that the jurisdictional determination of the Postmaster General was subject to review.

In Gegiow v. Uhl, 239 U. S. 3, a jurisdictional error of immigration officials was reviewed.

Since the State Tax Commission of Mississippi pos-

sesses only such powers as are conferred by statute, and as such possesses a special and limited, and not a general, jurisdiction, there is no presumption in favor of the jurisdiction of appellees, and to sustain the proceedings against appellant, the record must affirmatively show that appellees had jurisdiction. 15 C. J. Section 162, pages 842-3. See also Thatcher v. Powell, 6 Wheat, 119, 5 L. ed. 221; Grignon v. Astor, 2 How. 319, 11 L. ed. 283; Voorheed v. Jackson, 10 Pet. 449, 9 L. ed. 490; Williams v. Cammack, 27 Miss. 209; Linn v. Kyle, Walk. (Miss.) 315; Blanchard v. Buckholts, Walk. (Miss.) 64. In Warren County v. Mississippi River Ferry Co., 170 Miss. 183, the Supreme Court of Mississippi held that if some jurisdictional fact is lacking then the entire assessment is completely void.

The assessments against appellant, as shown at Page 22 of Printed Jurisdictional Statement, were made, according to appellees, "from the best information available," "by reason of the fact that the records kept by you were not adequate to determine the amount of tax for which you were heretofore liable, which said amended and additional assessments are as shown by copies of returns and assessments hereto attached for the said respective years." Section 6, Chapter 113, Laws of 1938, require taxpayers to keep adequate records and preserve invoices for a period of two years. For failure to so keep adequate records and preserve invoices for a period of two years, appellees may make additional assessments from the "best information available." Since the additional assessments against appellant purport to have been made from the best information available, by reason of the fact that he failed to keep adequate records, as shown by the record in this cause, as recited in the Registered Notice of the

said additional assessments, whether the right and duty of the Commissioner to make an additional return or assessment of the taxpayer's sales in addition to that returned by him, is dependent on the failure of taxpayer to keep adequate records, as held by the Supreme Court of Mississippi, is beside the question. The fact is, and there can be no gainsaying the fact, appellees have bottomed their case against appellant on his failure to keep adequate records, and they allege they made said additional assessments "from the best information available." Their case against appellant must stand or fall on the provisions and requirements of Section 6, Chapter 113, Laws of 1938. In his petition for a hearing, made mandatory by the Proviso contained in Section 6 of the statute, appellant raised the question of jurisdiction of appellees to make the additional assessments for sales tax against him. In the case of Ng Fung Ho v. White, 259 U. S. 276, the Court held that the claim that the defendant was a citizen was a denial of an essential jurisdictional fact. Before appellees could proceed under the law, jurisdiction to make the additional assessments must be proven by appellees, and must affirmatively appear of record. In the case of Crowell v. Benson, 285 U. S. 22, the Court speaks of jurisdictional facts, necessary to be proven to permit the making of a compensation award, like, for instance, where proceedings are taken against a person under the military law, and enlistment is denied, the issue has been tried and determined, de novo upon habeas corpus. See In re Grimley, 137 U. S. 157; In re Morrissey, 137 U. S. 157, 158; Givens v. Zerbst, 255 U. S. 11, 20.

Due Process involves jurisdiction of the subject-matter as well as the person of the party proceeded against.

Without jurisdiction a Court is powerless to act. Any proceedings without jurisdiction, or beyond the jurisdictional limits, are null and void.

This Court, in the case of Nelson v. Leland, 22 How. 48, 16 L. ed. 269, announced that where the jurisdiction of the lower court is assailed, a motion to dismiss will not be entertained, because that question is a proper matter for appeal, and for argument when the case is reached on the regular call of the docket.

Procedural Requirements of the Statute

After receiving the Registered notice, provided by Section 6, Chapter 113, Laws of 1938, a taxpayer may file a petition and state that the additional assessments against him are incorrect. While the statute provides that such additional assessments are considered prima facie correct for the purposes of the act, the Proviso at the end of Section 6, Chapter 113, Laws of 1938, requires the Commissioner to investigate that question fully before proceeding further under the section. The statute provides that the taxpayer shall have a hearing, and that the Commissioner shall investigate that question fully before proceeding further. In the case against appellant, he filed his petition and demanded a hearing. He met the prima facie against him. The burden shifted to appellees to investigate that question fully before proceeding further under the section. The language of the statute is not ambiguous. It permits of no interpretation except that when the taxpayer files his petition, he meets the prima facie case against him, requiring the Commissioner to grant a hearing and investigate the matter fully before proceeding further under the section. What Section does the legisla-

ture refer to? Certainly not Section 8, but Section 6. It is Section 6 that permits the making of additional assessments, from the best information available, when taxpayer fails to maintain adequate records and preserve his invoices for a period of two years. Since appellees have made their assessments against appellant, according to their admission and pronouncement, as shown by the record of this cause, from the best information available, by reason of the fact that taxpayer failed to maintain adequate records, Section 6 of the statute must apply, and none other, and the procedural requirements of Section 6, Chapter 113, Laws of 1938, must control and be held to govern over all other sections of the statute. The action of appellees against appellant deprived him of procedural due process of law, announced by the Court, through Mr. Justice Frankfurter, as essential to the validity of an order by a State administrative body. Procedural irregularities are alleged, and abundantly shown, by appellant. They have failed to adhere to the essential requirements of Due Process. They violated their statutory duty. They failed to investigate the matter fully before proceeding further under the section (section 6), and they failed to make a report in writing, setting forth a review of the cause and the essential facts of the matter (Section 1, Chapter 150, Laws of 1938).

As shown by the record, more particularly appellant's Special Bill of Exceptions, appellees not only failed to investigate the matter fully, before proceeding further under the section (6), but they said they would not investigate it fully, or at all.

As shown by appellant's Special Bill of Exceptions

(R. 19-92, Exhibit C to Petition for Writ of Certiorari, filed in the Circuit Court of Hinds County, Mississippi, R. 4-18), the officers, agents and employees of appellees did not make the said additional assessments against appellant "from the best information obtainable," as required by the statutes, but by the admission of John F. Frierson, Excise Commissioner, and the testimony of J. W. Cocke, Field Auditor, R. M. Hill, District Supervisor, and F. W. Freeman, Field Agent, the additional sales tax assessments made against appellant were based on comparison with the business of other merchants in Gulfport, Mississippi, for the year 1939, whereas the said additional assessments against appellant are for the years 1937 and 1938, appellees basing their conclusion as to the amount of business done by appellant in the years 1937 and 1938, on business done by other merchants in Gulfport in the year 1939. Such was not the best information available to appellees. Further, by his special bill of exceptions and Petition for Writ of Certiorari, appellant shows that appellees admitted at the hearing held before the Excise Commissioner, in Gulfport, that they made the additional sales tax assessments against appellant purposely high to take care of whatever they might be able to find. Again appellant shows the Court that the delegated authority to appellees, by the Legislature of the State of Mississippi, was not pursued and complied with. Appellees ignored their statutory duty; they exceeded their statutory authority; they proceeded beyond and contrary to their jurisdiction, and appellant says their proceedings are null and void, that their Final Order against him is void and must be set aside. These matters and things appear on the face of the record, they constitute errors of law, and Certiorari

was the proper remedy to correct them. The cases cited by the Supreme Court of Mississippi do not support the rule announced. In both cases cited an appeal was allowed to the Circuit Court. Here the statute does not allow an appeal to the Courts. But, as said by Mr. Justice Griffith, in the case of Federal Credit Co. v. Zepernick Gro. Co., 153 Miss. 489, 120 So. 173, relied upon by the State Court to sustain its holding that appellant could not complain of the lack of evidence to sustain the Order made against him, there may be "cautious exceptions to the rule." Mississippi is a common-law State; Certiorari is both a common-law remedy in Mississippi and a statutory remedy. In the case of Illinois Cent. R. Co. v. Miller, 141 Miss. 223, the Court held that certiorari lies to the Circuit court to review assessments of board of Railroad assessors and test the legality thereof. In the cases of Gulf & R. Co. v. Adams, and Yazoo & R. Co. v. Adams, 85 Miss. 772, 38 So. 348, the Court held that certiorari may be had to correct mistaken findings of fact by the railroad commission induced by an error of law appearing on the record, or the finding of a fact contrary to law, or the making of an order contrary and beyond its power, although Section 73, Code of 1930, confines the courts on certiorari to questions of law appearing on the face of the record and proceedings. In the case of Holberg v. Mason, 55 Miss. 112, the Supreme Court of Mississippi said that the Circuit Court has jurisdiction independent of the statute to issue a certiorari. As a common-law writ of certiorari, all of the matters and things complained of were before the Court, and the court in disposing of the case against appellant assumed a fact shown to be without support in the record. As a statutory writ of certiorari, the

errors complained of were before the Court, because the Court was required by the decisions shown above, to correct mistaken findings of fact induced by an error of law appearing on the record, the finding of a fact contrary to law, and the making of an order contrary and beyond the power of appellees.

The Supreme Court of Mississippi, as shown at Page 23 of the Printed Jurisdictional Statement, rests its decision on a basis of fact shown to be without any support in the record. The asserted Federal right of appellant, having been denied by the State Court without a factual basis in the record, it is the right and duty of this Honorable Court to review and correct the error. This court has announced the law to be that taxes must follow realities, not mere deductions from inadequate and irrelevant data. See the case of Union Tank Line Co. v. Wright, 249 U. S. 275.

In the case of Merchants National Bank v. Richmond, 256 U. S. 635, 41 St. Ct. 619, 65 L. Ed. 1135, the Court laid down the rule that the omission of the State courts below to pass upon certain evidence or make findings of fact thereon, doubtless because, under their respective views of the applicable law, the facts referred to were immaterial, does not relieve the Federal Supreme Court, on writ of error, now appeal, of the duty of examining the evidence for the purpose of determining what facts reasonably might be and presumably would be found therefrom by the State court if plaintiff in error's contention upon the question of federal law should be sustained, and the facts thereby shown to be material.

In Fiske v. State of Kansas, 274 U. S. 380, 47 St. Ct. 655, 71 L. Ed. 1108, the Court held it would review find-

ings of fact by a State court, where a federal right was denied as the result of a finding shown by the record to be without evidence to support it, or where a conclusion of law as to a federal right and a finding of fact are so intermingled as to make it necessary to analyze facts in order to pass on the federal question.

In the case of First National Bank of Hartford v. City of Hartford, 273 U. S. 548, 47 S. Ct. 462, 71 L. Ed. 767, reversing 203 N. W. 721, 187 Wis. 290, the Court held that it would, in dealing with mixed question of law and fact, review facts in order to correctly apply the law.

In Interstate Amusement Co. v. Albert, 289 U. S. 500, 36 S. Ct. 168, 60 L. Ed. 439, the Court held that, although ordinarily findings of fact by the State court in ordinary cases other than those arising under the "contract clause" of the Constitution are binding upon the United States Supreme Court, the rule has its exceptions, as, for instance, where there is ground for the insistence that a federal right has been denied as the result of a finding that is without support in the evidence.

To the same effect is the case of Watters v. Michigan, 248 U. S. 65, 39 S. Ct. 29, 63 L. Ed. 129, affirmed on other grounds, 192 Mich. 462, 158 N. W. 865.

While it is true that the Supreme Court of the United States, in an action at law, at least, has no jurisdiction to review the decisions of the highest court of a state upon a pure question of fact, although a federal question would or would not be presented, according to the way in which the question of fact was decided, the Court in Southern P. Co. v. Schuyler, 227 U. S. 601, 611,

57 L. Ed. 662, 689, 33 S. Ct. 277 (and cases cited Sec. 344, p. 238 U. S. C. A.-Jud. Code, Sec. 237) held:

> "The question arises, whether the basis of fact upon which the state court rested its decision denying asserted Federal right has any support in the record; for if not, it is our duty to review and correct the error."

Again, while this Honorable Court has settled the rule that the decision of a state court upon a question of fact ordinarily cannot be made the subject of inquiry before the Supreme Court of the United States, as stated in Missouri, K. & T. Ry. Co. v. Haber, 169 U. S. 613, 639, 18 S. Ct. 488, and Smiley v. Kansas, 196 U. S. 447, 453, 454, 49 L. Ed. 546, 25 S. Ct. 289, the Court held there are two equally well settled exceptions: "(1) Where a federal right has been denied as a result of a finding shown by the record to be without evidence to support it, and (2) where a conclusion of law as to a federal right and findings of fact are so intermingled as to make it necessary, in order to pass upon the federal question, to analyze the facts." See Northern Pacific Ry. Co. v. North Dakota, 236 U. S. 585, 593, 35 S. Ct. 429, 59 L. Ed. 735, and cases cited. See, also, Truax v. Corrigan, 257 U. S. 312, 324-5, 66 L. Ed. 254, 42 S. Ct. 124, and Aetna L. Ins. Co. v. Dunken, 266 U. S. 389, 45 S. Ct. 129, 69 L. Ed. 242, reversing 248 S. W. 165.

In the case of Abie State Bank v. Weaver, 282 U. S. 765, 51 S. Ct. 252, 75 L. Ed. 690, the Court held that where federal question is present in case appealed from state court, as well as nonfederal question, the Supreme Court of the United States must determine whether nonfederal ground independently supports judgment.

The record of this case shows that appellees permitted an appeal from the decision of the chairman of the

State Tax Commission (R. 116-8), and that said appeal was heard by the Excise Commissioner, pursuant to Sec. 1, Chapter 150, Laws of 1938, set out verbatim in the printed Jurisdictional Statement. The only provision of the Sales Tax law of Mississippi, requiring appeals from decisions of the Chairman of the Commission to be heard by the Excise Commissioner, is Section 1, Chapter 150, Laws of 1938. The Order of the Commission, shown at R. 116-18, referring the matter to the Excise Commissioner, for hearing in Gulfport, Mississippi, allows such appeal. The Registered Demand, shown at R. 100, dated October 3, 1939, was, and is, defective, because it failed to follow Section 6, Chapter 113, Laws of 1938, and it was quashed on timely Motion filed by appellant. That at least was the effect of the Order of December 7, 1939, shown at R. 101-05. What purports to be a Registered Assessment, shown at R. 106-7, fails to comply with and conform to the requirements of Section 6 of the statute. Section 6 requires a registered notice of "such returns and assessments," and then provides "* * * such returns and assessments shall be prima facie correct for the purpose of this act, * * * *". Motion to Quash this assessment should also have been sustained, and the proceeding dismissed. It is not the assessment that is prima facie correct, but the return and assessment. The petition of appellant for the hearing prescribed by Section 6 of the statute, (R. 108-111) was timely and complied with the statute. Jurisdiction of the Chairman of the Commission to make such additional assessments was attacked. His lack of jurisdiction is patent from the face of the Return and Response to the Writ of Certiorari. Appellant denied the jurisdiction of the Chairman, and appellees, he stated that he did maintain adequate records

and preserve invoices for a period of two years. (R. 108-111.) There was thus a denial of an essential jurisdictional fact. It became incumbent upon appellees to prove their jurisdiction. and such proof must affirmatively appear of record, otherwise the further proceedings of appellees, including the Final Order of May 24th, 1940, (R. 127-129) were, and are, null and void. The Order of January 12, 1940, appearing at R. 116-118, shows that appellees attempted to comply with the requirements of Section 1, Chapter 150, Laws of 1938, and taxpayer's appeal was referred to the Excise Commissioner for hearing and report in writing, setting forth a review of the cause and the essential facts of the matter, using the language of Section 1, Chapter 150, Laws of 1938, shown at Page 7 of Printed Jurisdictional Statement, filed herein. Instead of following the mandate of the statute, i. e., "At the conclusion of the hearing, the Excise Commissioner shall submit all written evidence, documents, records and other pertinent information to the other members of the commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter" which is a duty enjoined on appellees by the legislature, the Excise Commissioner wrote a letter to the State Tax Commission, dated January 12, 1940, concluding "that the additional tax should remain as assessed." (R. 114-115.) Appellant promptly filed his written objections, showing his reasons, based on Section 1, Chapter 150, Laws of 1938, (R. 120-123) and made application to have the Order amended and corrected to show the improper and unlawful action of the Excise Commissioner and appellees. As shown by the concluding paragraph of the Order of January 12, 1940, (R. 116-118) appellees made a further attempt to comply with the

provisions of Section 1, Chapter 150, Laws of 1938, using the following specific language:

> "NOW, Therefore, It is Ordered By The Commission that the said Eddie J. Viator be given notice of the fact that the Excise Commissioner has filed his report with the Commission, concluding that said assessment for additional taxes should be upheld and retained; and that the Commission will, on Friday, the 26th day of January 1940, at 10:00 A. M., in the office of the Tax Commission in the New Capitol Building in Jackson, Mississippi, consider said report and recommendation of the Excise Commissioner, with a view of making a final adjudication in connection with the matter of said demand for additional Sales Taxes; and if the said Eddie J. Viator desires a further hearing on the said cause, the whole Commission shall hear his appeal at its office in the Capitol on the said day of Friday, January 26th, 1940, at 10:00 o'clock A. M."

The only statutory provision for such attempted proceedings, contemplated by the Order of January 12, 1940 (R. 116-118) is Section 1, Chapter 150, Laws of 1938.

The Order of appellees, dated Jnuary 31, 1940, (R. 124-126) further shows an attempt by appellees to comply with and conform to Section 1, Chapter 150, Laws of 1938, appellees using the following specific language:

> "On the said date of January 31, 1940, in the said office of the State Tax Commission, before the entire Commission, the said appeal came on for hearing; * * * * The Attorney for the taxpayer read his objections to the report of the Excise Commissioner and the assessment which has been made thereon by the Commissioner. * * * * "

By Chapter 150, Laws of 1938, Chapter 119, Laws of 1932, defining the duties and powers of the Chairman

of the Commission, was amended. By prior law the Chairman of the Commission was the Executive officer thereof, and had full jurisdiction in all matters pertaining to the Sales Tax Law of Mississippi. By Chapter 119, Laws of 1932, the powers of the Chairman were limited and restricted. His jurisdiction as to certain matters, powers and rights, was specifically taken away by Chapter 119, Laws of 1932, which latter statute was amended in 1938, and the same now appears as Chapter 150, Laws of 1938. The legislature used this language in restricting the jurisdiction of the Chairman of the Commission, viz:

> "But his authority shall not include the assessment of railroads and persons, corporations and associations required to be assessed by the Commission, as State Railroad Assessors, nor the equalization among the counties of county assessments of property therein, nor the consideration of matters relating to assessments among counties, nor the hearing of appeals of taxpayers from decisions of the Chairman as to taxes imposed by laws administered exclusively by him."

Section 1, Chapter 150, Laws of 1938, then goes on to provide for the hearings of appeals from decisions of the Chairman, making assessments for sales tax and for additional sales tax, and prescribes the procedure at the hearing of such appeals, the duties enjoined on the Excise Commissioner when hearing an appeal from an assessment for sales tax, and provides a further appeal to "the Whole Commission," providing the taxpayer does not assent to the rendition of decision on the appeal. The express provisions of Section 1, Chapter 150, Laws of 1938, requiring the Excise Commissioner, on hearing such appeal, "At the conclusion of the hearing, * * * submit all written evidence, documents, rec-

ords and other pertinent information to the other members of the Commission, together with a report in writing setting forth a review of the cause and the essential facts of the matter," were violated by the Excise Commissioner, and by appellees. Without compliance with the statute, the action of appellees was arbitrary and capricious, and ultra vires. The statute requires appellees to make a finding of basic facts, enjoining on appellees the duty to report the essential facts of the matter. Here is an instance of a requirement of a finding of fact by an administrative tribunal.

Appellees having acted in an adjudicative capacity, their action is void for want of a finding of essential facts, required by the statute.

Where a statute, delegating authority to an administrative body, has expressly provided for findings of fact, this Honorable Court has consistently held that compliance with the statutory mandate is a condition precedent to the exercise of the delegated power. See Wichita Railroad Co. v. Public Utilities Commission of Kansas, 260 U. S. 48, and Mahler v. Eby, 264 U. S. 454. In United States v. Baltimore & Ohio Railroad, 293 U. S. 454, the Court held invalid an order of the Interstate Commerce Commission for failure to make quasi-jurisdictional findings of fact. In Panama Refining Co. v. Ryan, 293 U. S. 388, the Court required express findings of fact to be made by the President under a statute which required none. In Panama Refining Co. v. Ryan, supra, the Court cited Wichita Railroad Co. v. Public Utilities Commission, supra, and Mahler v. Eby, supra, to substantiate its conclusion. In each of the latter cases it was a specific requirement of the statute that findings be made, but as Mr. Chief Justice Taft pointed

out in Mahler v. Eby, the decision in both cases rests "not only on the language of the statute, but also on the general principles of constitutional government."

While findings of fact in the Panama Refining Co. v. Ryan case, supra, are required by the Court in order to prevent the President from exercising an unfettered discretion, and thus rendering Congressional qualifications on his authority ineffectual, the Court also refers to "due process of law" as an additional basis of its holding.

Since the statute here involved requires a finding of the essential facts, and findings are required by the Court on "general principles of constitutional government," it is respectfully submitted that appellee's Order against Appellant, shown in the record of this cause, attempting to adjudicate liability for additional sales tax, is null and void and must be set aside.

In the case of Erhardt v. Schroeder, 155 U. S. 124, 15 Sup. Ct. Rep. 45, the Court held that a taxing statue, even if not explicitly mandatory, is by the judiciary so regarded where literal observance of its terms affords substantial protection to a complaining taxpayer; that such is a question of importance to the taxpayer because frequently errors in taxation may at times be corrected only by pointing to a failure of the taxing officer to obey a law which might have prevented the errors if it had been strictly followed.

If the State court in the instant case had so construed Section 6, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, and applied said statutes against appellant, the errors complained of here would have been corrected. Certainly appellant has done his

part; he has pointed to the failure of the taxing officers to obey the law.

In Gully, State Tax Collector v. Jackson International Company, 165 Miss. 103, the State court laid down this rule, citing a number of cases :

> "The laws are to be strictly construed against the taxing power. The power cannot be implied. All doubts must be resolved in favor of the taxpayer."

In the case against appellant, the State court failed to afford the taxpayer the equal protection of the law.

CONCLUSION.

The action of appellees, being without and beyond the intendment of the legislature, is arbitrary and capricious; it violates the Fourteenth Amendment to the Constitution of the United States. As construed and applied here, Section 6, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, violate the constitutional rights of appellant, the statutes of the state conflict with the due process clause of the Constitution of the United States, and this Honorable Court should not abdicate its right to declare said statutes unconstitutional, null and void, and set aside the Order made by appellees and the judgment of the Supreme Court of the State of Mississippi. This Honorable Court is requested to grant Appellant's Petition for Rehearing, so that the judgment of the Supreme Court of Mississippi may, on further consideration, be reversed and that right and justice may be done in the premises.

Counsel for appellant asks the indulgence of this Honorable Court for going to such length to extend his views as to why he believes appellant is entitled to a rehearing, and finally to a reversal of the final judgment of the Supreme Court of Mississippi. He believes, however, that he would fail in his duty to his client if he

were to pass up the opportunity afforded by the practice of this Court to permit submission of a brief on Petition for Rehearing.

Because Counsel believes that this Honorable Court has jurisdiction of this apeal from the Supreme Court of the State of Mississippi, under the provisions of Section 237(a), of the Judicial Code, as amended, and last, but not least, on Certiorari, under the provisions of Section 237(b) of the Judicial Code, as amended, and that the papers whereon the appeal was allowed may be treated as an application for Writ of Certiorari, under the provisions of Section 237(c) of the Judicial Code, as amended, he urges the Court to examine the record, with particular reference to the matters and things involved in this Cause No. 1113, urged by him, and grant his Petition for Rehearing. Another urgent reason for his petition for rehearing in this cause, is that Counsel for appellant understands the decisions of this Honorable Court to hold that where an appeal to the Supreme Court of the United States is allowed by statute, equitable relief by a three judge Court will not be granted, under Section 266 of the Judicial Code, as amended by the Johnson Act, without first exercising such right of appeal and certiorari, and because he wishes to avoid the prosecution of a second, or a third, suit.

Counsel for appellant, therefore, respectfully presents his petition for rehearing, and prays that the Court will grant such petition, on such grounds, and confined to such questions, as the Court may deem meet and proper in the premises.

Albert Sidney Johnston, Jr.,
Counsel for Appellant, Petitioner

(10)

FILED
MAY 12 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1113

EDDIE J. VIATOR,

Appellant,

vs.

STATE TAX COMMISSION OF MISSISSIPPI, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI.

PETITION FOR REHEARING.

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Appellant.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 1113

EDDIE J. VIATOR,

Appellant,

vs.

STATE TAX COMMISSION OF MISSISSIPPI, ET AL.

PETITION FOR REHEARING.

Comes now the above named Appellant, and Petitioner, Eddie J. Viator, and presents this, his petition for a rehearing of the above entitled cause, and, in support thereof, respectfully shows:

1. Appellees were without jurisdiction of the subject-matter, and, their lack of jurisdiction overwhelmingly appearing of record, their Final Order of May 24th, 1941, approving the two additional sales tax assessments against appellant, petitioner, is null and void, and the jurisdiction of the lower court being assailed, that matter is a proper question for appeal, and certiorari, and for argument, when this case is reached on the regular call of the docket of this Honorable Court.

2. Appellees having failed to accord appellant procedural due process of law, their action is null and void, and violates the Fourteenth Amendment to the Constitution of the United States.

3. Appellees having failed to conform to the essential requirements of fair play, and due process of law, their action is arbitrary and in conflict with the Fourteenth Amendment, the purpose of which is to guard against impairment by State action.

4. Appellees have failed to perform the duties specifically enjoined upon them by law.

5. Appellees failed to pursue the authority conferred upon them in the mode required by Section 6, Chapter 113, Laws of Mississippi of 1938, and Section 1, Chapter 150, Laws of Mississippi of 1938, to authorize and empower them to make the determination of additional sales tax allegedly due by petitioner.

6. Appellees violated fundamental rules of law affecting the rights of petitioner, as a citizen of the United States, in making their determinations and assessments against petitioner, to the prejudice of petitioner, in violation of the Fourteenth Amendment to the Constitution of the United States, depriving petitioner of due process of law and the equal protection of the law, and the effect of the Final Order of May 24, 1941, if permitted to stand, will take the property of petitioner without due process of law.

7. Appellees failed and refused to offer any competent proof of all the facts necessary to be proved in order to authorize the making of the additional sales tax assessments against petitioner.

8. Appellees failed and refused to make a basic finding of fact, based upon substantial evidence of record, thus

permitting the exercise of arbitrary power, condemned by the Fourteenth Amendment to the Constitution of the United States.

9. Appellees failed and refused to make a "report in writing, setting forth a review of the cause and the essential facts of the matter", required by Section 1, Chapter 150, Laws of 1938 of Mississippi, and the principles of Constitutional government.

10. The statutes involved in this cause, Section 6, Chapter 113, Laws of Mississippi of 1938, and Section 1, Chapter 150, Laws of Mississippi of 1938, as construed and applied by appellees, the Circuit Court of Hinds County, and the Supreme Court of Mississippi, deny petitioner due process of law.

11. The basis of fact upon which the State court has rested its decision, denying the asserted Federal rights of appellant, being without any support in the record, it is the right and duty of this Honorable Court to review and correct the error.

12. The additional assessments for sales tax against appellant, petitioner, do not follow realities, upon which taxes must be based, but mere deductions from inadequate and irrelevant data.

13. Certiorari was the proper remedy of appellant, petitioner, to correct mistaken findings of fact induced by an error of law appearing on the record, the finding of a fact contrary to law, and the making of an order contrary and beyond the power of appellees.

14. The proviso contained in Section 6, Chapter 113, Laws of 1938, must be read in connection with, and as part of the whole, and is as much a part of the statute as any sentence or clause, thereof.

15. The Federal right asserted by appellant, petitioner, was erroneously decided by the State court, the decision of the Federal right was necessary to the determination of the cause, and the judgment of the State court, as given, could not have been reached without deciding it.

16. The opinion of the State court assumes as true what does not appear of record. The opinion of the State court is put upon the ground that evidence is not before the court upon certiorari, whereas the charge of lack of evidence to support the Order made is a question of law. The State court holds that appellant was given an opportunity to overcome by evidence the facts upon which the additional assessments were made, whereas the record shows the assessments were not based on facts, but upon deductions from inadequate and irrelevant data, and thus the rule of law that taxes must follow realities, was violated. The reasons assigned for the judgment of the State court are not broad enough to sustain it. The asserted Federal right on the part of appellant, petitioner, was actually considered by the State court, and decided against appellant, petitioner.

17. Section 6, Chapter 113, Laws of Mississippi of 1938, being the only statutory provision of the State permitting additional assessments for sales tax to be made "from the best information available", and the additional sales tax assessments against appellant, petitioner, shown by Registered Notice of December 8, 1939, (R. 100, 106-7, 130-130) and Exhibits "E" and "F" to Appellant's petition for writ of certiorari, having been made, according to the language of the Registered notice, required by Section 6," * * * from the best information available in addition to the previous returns and payment of sales tax heretofore made by you for the periods January 1, 1937 to December 31, 1937 and January 1, 1938 to December 31, 1938, by reason of the fact that the records kept by you were not adequate to

determine the amount of tax for which you were heretofore liable, which said amended and additional assessments are as shown by copies of returns and assessments hereto attached for the said respective years, * * *", jurisdiction of appellees to so proceed against appellant, petitioner, must be confined to the statutory delegation, and none other, and must affirmatively appear of record, and Section 6 of the statute must prevail over all other sections of the statute.

18. The requirement of Section 6, Chapter 113, Laws of 1938, following the filing of petition by taxpayer, that "* * * the commissioner shall grant a hearing on such petition and investigate that question fully before proceeding further under this section" is mandatory, and must be followed. Since appellees failed and refused to "investigate that question fully", they failed to afford appellant, petitioner, procedural due process of law; they failed to do their statutory duty. Their order against appellant, petitioner, is contrary to and beyond their power. Their actions were approved by the Supreme Court of Mississippi. The statute as thus construed and applied against appellant, petitioner, is unconstitutional, null and void, and violates the Fourteenth Amendment to the Constitution of the United States.

19. The prima facie case against a taxpayer who fails to maintain adequate records and preserve invoices for a period of two years, provided by Section 6, Chapter 113, Laws of 1938, is made to depend upon "such returns and assessments" provided for and required by the statute in such cases made and provided. The statute provides "the commissioner may make additional returns and assessments from the best information available, and shall give notice by registered mail of such returns and assessments, and such returns and assessments shall be prima facie correct

for the purpose of this act * * * ". Nowhere in the record do the returns and assessments appear. They are conspicuous by their absence. The formalities required by the statute were not adhered to. Appellees have failed to make out a case against appellant. This Honorable Court should review the record and correct the error, and set aside the judgment of the Supreme Court of Mississippi.

20. The judgment appealed from is a final judgment of the highest court of the State of Mississippi in which a decision in the suit could be had, the validity of Section 6, Chapter 113, Laws of 1938, and Section 1, Chapter 150, Laws of 1938, as construed and applied, on the ground of being repugnant to the Constitution of the United States, is drawn in question, and the decision of the Supreme Court of Mississippi is in favor of their validity, and this Honorable Court has jurisdiction of this cause on appeal by virtue of Section 237(a) of the Judicial Code, as amended, and by certiorari by virtue of Section 237(b) of the Judicial Code, as amended, and treating the papers whereon the appeal was allowed as a petition for certiorari, pursuant to Section 237(c) of the Judicial Code, as amended, this Honorable Court should regard and act on the papers as a petition for writ of certiorari, and it is respectfully submitted, grant Writ of Certiorari, and require that there be certified to it for review and determination, with the same power and authority and with like effect as it brought up by appeal, the record of this cause, for further proceedings in this Honorable Court, so that right and justice may be done to Petitioner.

21. Petitioner denied that he failed to maintain adequate records and preserve his invoices for a period of two years, and thus there was a denial of a jurisdictional fact. Without violation of the Due Process clause of the Federal constitution, he cannot be proceeded against without a

judicial, as distinguished from a mere administrative trial of the fact of adherence to the sales tax law of the State of Mississippi.

22. No court, save that of final authority, has the power to be the arbiter of its own jurisdiction, and this Honorable Court, as the Court of final authority in the United States, should review the record of this cause and determine for itself whether appellees had jurisdiction of the subject-matter against appellant, petitioner, and, if having jurisdiction of the subject-matter, they acted beyond their jurisdiction, and contrary to the constitutional rights of petitioner.

For the foregoing reasons it is respectfully urged that this petition for a rehearing be granted, and that the judgment of the Supreme Court of Mississippi be, upon further consideration, reversed.

Respectfully submitted,

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Appellant, Petitioner.

Certificate of Counsel.

I, Albert Sidney Johnston, Jr., Counsel for the above-named Eddie J. Viator, appellant, petitioner, do hereby certify that the foregoing petition for a rehearing of this cause is presented in good faith and not for delay.

ALBERT SIDNEY JOHNSTON, JR.,
Counsel for Appellant.